

TATITLEK CORPs

IBLA 86-7

Decided February 2, 1988

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving conveyance of certain lands selected under Native village applications AA-6703-A2, AA-6703-B2, and AA-6703-C2, subject to reservations to the United States.

Reversed.

1. Alaska Native Claims Settlement Act: Easements: Public Easements

A public easement for a future road may be reserved across lands conveyed to Native corporations only if such easement is site specific and the road actually planned for construction within 5 years of the date of conveyance, as required by 43 CFR 2650.4-7(b)(1)(v). An easement for a future road is not site specific where the easement describes one of three proposed routes and the location studies required to determine the preferred route have not been authorized.

APPEARANCES: Mary Gordaoff, President, Valdez, Alaska, for Tatitlek Corporation; Mark R. Moderow, Esq., Anchorage, Alaska, for Chugach Alaska Corporation; E. John Athens, Jr., Esq., Fairbanks, Alaska, for the State of Alaska; Michael A. Barton, Juneau, Alaska, for the Forest Service, U.S. Department of Agriculture.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Tatitlek Corporation (Tatitlek) appeals from an August 22, 1985, decision of the Alaska State Office, Bureau of Land Management (BLM), 1/ approving conveyance of certain lands pursuant to Tatitlek's village selection

1/ The State of Alaska and the Forest Service also appealed BLM's decision. However, on Oct. 28, 1985, the State of Alaska filed a notice with the Board withdrawing its appeal, and by order of Dec. 11, 1986, the Board approved a stipulated settlement of all issues in the appeal of the Forest Service. Accordingly, both appeals are hereby dismissed.

applications AA-6703-A2, AA-6703-B2, and AA-6703-C2. ^{2/} BLM approved such conveyance subject to easement EIN 42 C5 for the proposed Copper River Highway. In its decision, BLM described the reservation as follows:

(EIN 42 C5) An easement one hundred (100) feet in width for a proposed road from FAS Route 851 in Sec. 15, T. 10 S., R. 3 E., Copper River Meridian, westerly to the Richardson Highway. The uses allowed are those listed above for a one hundred (100) foot wide road easement. Should construction not begin within the five years of the date of conveyance this road shall be reduced to a trail easement twenty-five (25) feet in width. The uses allowed would then be those listed above for a twenty-five (25) foot wide trail easement.

Easement EIN 42 C5 follows the Tasnuna River, and constitutes one of three alternate proposed routes (along with the Tickel and the Wood Canyon routes), for the completion of the Copper River Highway. The Tasnuna alternative, for which easement EIN 42 C5 was reserved, will traverse certain of the lands approved for conveyance to Tatitlek in BLM's decision. In a letter dated July 23, 1985, to the office of the Regional Solicitor, Mary Gordaoff, President of Tatitlek, described the location and history of the proposed Copper River Highway. We set forth portions of her description below:

The proposed roads easement through the Tasnuna River Valley is one [of three] alternative route[s] of the proposed Copper River Highway which would link the community of Cordova to interior Alaska existing road systems. The Copper River Highway was begun many years ago. Construction began at Cordova and the route followed the old Northwest Railroad bed. The highway was completed up to the existing "million dollar" bridge, 30 miles south of the junction of the Tasnuna and Copper Rivers. With the collapse of the bridge span during the 1964 earthquake construction came to a halt.

Subsequent appropriations, both state and federal, have been directed toward restoring and maintaining the existing highway structure and studying routes for completion alternate to the original rail bed. The studies were first consolidated in the 1974 Environmental Impact Statement produced by the [Alaska Department of Transportation and Public Facilities]. The Department was enjoined from proceeding further by the Sierra Club

^{2/} The lands approved for conveyance to Tatitlek in BLM's Aug. 22, 1985, decision are as follows: secs. 7, 8, 16, 17, 21, 22, 23, 25, 26, and 36, T. 9 S., R. 1. W., Copper River Meridian; secs. 1, 2, 3, 4, 5, 6, and 12, T. 9 S., R. 2 W., Copper River Meridian; secs. 11, 23, 24 (fractional), T. 12 S., R. 6 W., Copper River Meridian; secs. 13, 14, 20, 24, 29, and 32, T. 13 S., R. 7 W., Copper River Meridian.

which requested that a regional transportation study be completed examining the entire region and alternate methods of access.

Between 1975 and 1984, the department did not request and the legislature did not approve funding for the project. Remaining funds from earlier appropriations were used to produce a supplement to the EIS incorporating the findings of the regional study. Those findings were favorable to a highway over other transportation systems.

Tatitlek challenges BLM's decision to reserve easement EIN 42 C5 on the basis that it does not meet the requirements of 43 CFR 2650.4-7(b)(1)(v), which provides that public easements for transportation purposes may be reserved "for future roads, including railroads and roads for future logging operations, only if they are site specific and actually planned for construction within 5 years of the date of conveyance." At the beginning of its statement of reasons (SOR), Tatitlek summarizes its arguments as to why easement EIN 42 C5 fails to meet the criteria embodied in 43 CFR 2650.4-7(b)(1)(v):

The Bureau of Land Management erred in reserving easement EIN 42 C5 as a 100-foot easement for a future roads. It was error because there is no actual plan for any highway to be built along that route within five years of the conveyance date. No actual plan exists because the State of Alaska has never completed a location study, making the easement site nonspecific as well. The reservation therefore impermissibly burdens the Corporation's title, creating a floating easement indefinite in duration, non-specific as to use, and lacking any assurance of topographical suitability for transportation.

The agency's decision was arbitrary and capricious: it was based on insufficient data in that no plat, survey nor site-specific plan for construction of a roadway existed, and no route nor choice of routes had been officially or publicly approved or funded. It incorrectly stated the law regarding future road easements, and drew an improper, vague and overbroad conclusion as to easement EIN 42 C5.

(SOR at 1).

No response to Tatitlek's SOR was filed by BLM.

[1] In a letter dated July 25, 1985, the Alaska Department of Transportation and Public Facilities (Alaska DOT) responded to a request by BLM for information regarding the status of the Copper River Highway project. The letter reflects the most recent information regarding the status of the highway project available to BLM when it issued its August 22, 1985, decision. In its letter, the Alaska DOT presents a "Synopsis of Schedule and Expenditures" for the highway completion project:

At present we are completing a supplemental to the original Copper River Highway Environmental Impact Study. The Study was completed in November, 1973. Public meetings held in conjunction with this study determined that the preferred alternative route was Tasnuna. The supplemental should be completed within the next few months. By the time the supplemental is completed we will have spent approximately \$350,000.

In last year's (FY 86) Northern Region Capital Budget Request we included \$100,000 for completion of a route location study to determine what would be the final location of the Copper River Highway completion. This request was excluded from the Governor's final capital budget submittal to the legislature. It is currently our intention to resubmit this request in this year's (FY 87) Regional Capital Budget submittal. If this request is incorporated into the Governor's capital budget and is eventually approved by the legislature, location study work could commence in the summer of 1986 and be concluded within 12-18 months.

Actual study duration would depend on the difficulty in obtaining needed field data, other workload and the relative priority of the project. Part of this location study would also include public meetings to gather input from affected persons, A field evaluation of rare and endangered species would be done as well as as an archaeological investigation along the alignment.

Once the location study is completed, funds could then be requested to begin designing the project, relocate utilities work and purchase needed right-of-way. Given the length of any of the possible routes, as identified in the 1973 Copper River Highway Environmental Impact Study, design and construction would have to be done in phases, since the cost to do the road would be substantial. Therefore, it is anticipated that design and construction would be requested in 15-to-20 mile sections annually. Design of each section would take approximately 2 years, and construction would require another 2 years. With this approach, we would expect the project to be at least 10 years in duration.

In her aforementioned letter dated July 23, 1985, to the Regional Solicitor, Mary Gordaoff registered objections to easement EIN 42 C5, maintaining that "the regulatory requirement is not met at least until a location study is finalized showing that a particular route through a particular area is determined to be the preferred route and legislative funding exists to begin construction." She asserts that there are "currently three routes under consideration for the completion of the Copper River Highway and no funds have been appropriated for the completion of the location study." Her conclusion is that "until a route is chosen, an easement reserved in a title document is not site specific. Until a route is chosen and funds are appropriated for

construction startup within 5 years, the road cannot be said to be actually planned for construction within 5 years." By letter of August 23, 1985, the Deputy Regional Solicitor responded to Gordao's objections, expressing his opinion that BLM's decision to reserve easement EIN 42 C5 was reasonable and legally supportable.

Tatitlek relies in part upon *Alaska Railroad*, 7 ANCAB 43, 89 I.D. 219 (1982), in arguing that easement EIN 42 C5 does not comply with 43 CFR 2650.4-7(b)(1)(v). In *Alaska Railroad*, the Alaska Native Claims Appeal Board ruled that an easement for a railroad failed to meet the criteria of that regulation, since "the minimal submission of a map, along with a letter stating that certain lines on the map depict proposed railroad extensions cannot be found to demonstrate an actual plan for construction within the meaning of the regulation." 7 ANCAB at 62, 89 I.D. at 227. Tatitlek's application of 43 CFR 2650.4-7(b)(1)(v) and *Alaska Railroad* to the case at hand is as follows:

The record, then, includes planning studies but no plan. In place of a map, the State of Alaska DOT&PF undertook only the minimal submission of aerial photographs with the proposed route indicated. Instead of an accompanying letter, written descriptions of the type of construction that might possibly be appropriate were given to accompany the pictures, along with a projected timetable. What the BLM decision makes plain is that the route is still only proposed. * * * DOT&PF estimates the Bridge will cost \$20 million to build. [Southern Interior Regional Transportation Study (SIRTS) at 86]. And funding for the route location study required to plan construction, a mere \$100,000, was cut from the governor's final capital budget submittal for fiscal year 1986. * * * Thus, no branch or agency of the State of Alaska other than DOT&PF has given any measure of authoritative validity to the proposal.

(SOR at 2, 3).

We agree with Tatitlek that BLM's easement is not site specific. The Alaska DOT states that only when funding is approved can it conduct location studies and select the final location of the road. We conclude that BLM's easement for a future road is not site specific because the easement describes one of three proposed routes and the location studies required to determine the preferred route have not been authorized. Given that conclusion, we need not determine whether the road is "actually planned for construction." 3/

We therefore conclude that easement EIN 42 C5 fails to meet the requirement of 43 CFR 2650.4-7(b)(1)(v) that an easement for a future road be site specific.

3/ We note that the preamble to 43 CFR 2650.4-7(b)(1)(v) states that "where there is a requirement for a construction plan, there must be a plan in existence at the time of conveyance." 43 FR 55327 (Nov. 27, 1978).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision to reserve easement EIN 42 C5 is reversed.

John H. Kelly
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

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ADMINISTRATIVE JUDGE BURSKI CONCURRING:

The issue presented by this appeal is whether easement EIN 42 C5, one of three proposed alternate routes for the completion of the Copper River Highway, is properly reserved in the conveyance of the surface estate of certain lands to the Tatitlek Corporation (Tatitlek). The majority concludes that it is not. It is with some reluctance that I find that I must concur.

The regulation at issue, 43 CFR 2650.4-7(b)(1)(v), provides, inter alia, that if public easements are to be reserved, they shall "[b]e reserved for future roads, including railroads and roads for future logging operations, only if they are site specific and actually planned for construction within 5 years of the date of conveyance." As is obvious from attempts to apply the regulation in the instant case, this provision is scarcely a paragon of clarity.

The first question which must be analyzed is whether it is the "road" or the "easement" which must be site specific under this regulation. This becomes relevant because, while the majority asserts that the "easement" is not site specific, it is my view, based on a review of the plats, that the "easement" is site specific. It is identified with absolute certitude in this record. Indeed, inasmuch as it follows the exact route of a 25-foot trail easement which Tatitlek has now accepted, it seems to me that there can be no question as to the placement of the easement. The "floating easement" problem which led to the decision in *Alaska Public Easement Defense Fund v. Andrus*, 435 F. Supp. 664 (D. Alaska 1977), is simply not involved in this appeal.

The requirement of site specificity is mirrored in section 903(a)(2) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1633(a)(2) (1982). That section provides that, in reserving easements on lands conveyed to Native Corporations or Native Groups, "each easement should be specifically located and described and should include only such areas as are necessary for the purpose or purposes for which the easement is reserved." It is clear that the requirement of this provision relates to specificity in the location of the easement. If this were the requirement provided for in 43 CFR 2650.4-7(b)(1)(v), I would hold that the easement herein met that requirement.

The problem, however, is that, whether intentionally or not, the regulation has been drafted in such a way as to require that the road rather than the easement be site specific. Thus, the regulation provides that easements be reserved for future roads "only if they are site specific and actually planned for construction within 5 years of the date of conveyance." Not only is the word "roads" the immediate antecedent of the pronoun "they," the succeeding phrase "actually planned for construction" makes no sense unless it refers to the road and not the easement, since easements are not constructed. Thus, I must conclude that a reservation for a future road cannot be permitted unless the road, itself, is site specific at the time of the conveyance. In the instant case, it seems clear that, even though the route reserved is the

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perferred alternative, the route is only one of three possible alternatives. This being the case, I agree that the easement could not be reserved for this portion of the proposed Copper River Highway.

James L. Burski
Administrative Judge

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